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Protections for Transgender Employees

By Jennifer Levi

Normal, a recent HBO movie, features a transgender protagonist named Roy who endures decades of personal torment before finally telling her wife, her employer, her church, her children, and eventually her coworkers what she has known for years: that she has a female gender identity and intends to undergo medical care and treatment to transition from male to female. Sadly, the harassment that Roy later endures from coworkers is, like the movie's title, quite "normal." Many transgender employees routinely face demotions, unfavorable conditions of employment, and even discriminatory terminations—due not to job-related problems but to employers' discomfort with and animus against transgender people.

Express Protections

A growing number of jurisdictions specifically include transgender people in antidiscrimination laws by prohibiting discrimination on the basis of gender identity and expression, or by including language similarly intended to prohibit discrimination against the broad range of people who do not conform to stereotypes of how a "real" man or woman should look or act. Three states—Minnesota, Rhode Island, and most recently New Mexico—include transgender people explicitly in their employment antidiscrimination laws. Protections are even broader at the local level. As of January 2003, more than fifty cities and towns had passed trans-inclusive antidiscrimination ordinances—areas as diverse as Boston; Louisville, Kentucky; New York City; and Ypsilanti, Michigan. (An updated list of locations with such protections is maintained at www.transgenderlaw.org.)

Sex Discrimination Protections

In addition to these explicit protections, transgender people sometimes find protection in sex discrimination provisions. Logically, protection under

existing sex discrimination laws seems the most straightforward—hostile treatment in the workplace because a person decides to transition from one sex to another or fails to conform to stereotypical gender expectations can hardly be the result of anything other than "sex."

In several cases brought by transgender litigants in the 1970s and 1980s, however, courts excluded transgender people from sex discrimination protections by narrowly interpreting the laws. In these decisions, the courts often concluded that transgender people were neither male nor female and therefore not covered, or that discrimination based on "change of sex" was different from discrimination based on sex.

The flawed reasoning of these older cases was cast into doubt by the 1989 case of *Hopkins v. Price Waterhouse* and the 1996 case of *Oncale v. Sundowner*, both of which rejected the premise that federal sex discrimination laws should be narrowly understood. Since these two decisions, state and federal courts (specifically in California, Massachusetts, New Jersey, and Ohio) have upheld sex discrimination claims by transgender litigants. Most recently, in fact, the Ninth Circuit explicitly overturned *Holloway v. Arthur Andersen*, one of two foundational cases that spawned the earlier exclusions.

Despite the analytical arguments in favor of sex discrimination protections for trans people, there remain important reasons to codify explicit protections, particularly in light of historical exclusions. Adding explicit protections ensures greater predictability of future case outcomes and reassures trans people and reminds employers that they are protected.

Disability Protections

State and local disability laws also provide some protections for transgender employees who experience discrimination in the workplace. As is often (and correctly) pointed out, being transgender is not a "disability" in the colloquial sense—transgender people are not infirm or physically limited from performing tasks. But in antidiscrimination laws and benefits laws such as social security disability insurance, the term "disability" is not limited to individuals who have a

handicap or appear outwardly affected. Under antidiscrimination laws, disability refers to a wide range of health conditions that are significant but do not disqualify a person from performing a job. Disability laws, unlike benefits laws, ensure that people who are able to work are not prevented from doing so by the prejudice or bias of others. The misunderstanding surrounding the term should not prevent trans people from accessing the courts and other protections—instead it presents compelling reasons to continue to correct and dispel stereotypes associated with disability.

Most transgender people are currently excluded from disability protections under federal disability statutes. As a result of a political compromise with no basis in medical reality, the two federal disability laws—the Federal Rehabilitation Act (FRA) and the Americans with Disabilities Act (ADA)—explicitly exclude from coverage "gender identity disorders not resulting from physical impairments." As a consequence, most transgender people may not bring claims of disability discrimination under federal antidiscrimination laws. Fortunately, however, some state disability laws omit this exemption, and transgender people in these jurisdictions may be protected under the state statutes. Moreover, transgender people may be protected in states where the state disability law is modeled on the federal laws but omits the federal laws' express exclusion. See *Doe ex rel. Doe v. Yunits*, 2001 WL 664947 (Mass. Super. Feb. 26, 2001).

The following analysis may vary from state to state, depending on the extent to which the jurisdiction may depart from federal law. In most states, a person is protected from discrimination if he or she:

- has a physical or mental impairment that substantially limits a major life activity (including sex);
- has a record of such an impairment; or
- is regarded as having such an impairment.

A transgender person residing in a state that does not have an explicit exclusion for gender identity disorders and who falls within one of the three

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ly law that will promote the best interests of the children involved.

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prongs is entitled to protection under the state disability discrimination provisions. Several state human rights commissions across the country, including Connecticut, Florida, Illinois, Massachusetts, and New Hampshire, have interpreted state disability laws to include transgender people.

Some transgender people experience gender dysphoria (generalized discomfort or unease about birth gender) and, as a result, can easily demonstrate that they have an "impairment" under the terms of the relevant state statutes. At the same time, they may be uncomfortable about embracing a psychiatric diagnosis, which still carries the possibility of stigma in some areas of society. Even among those in the transgender community who reject the psychiatric model, most do not reject the premise that being transgender is likely a medical condition caused by biological factors that are not yet fully understood—and a growing body of scientific research supports this conclusion.

Many transgender employees face discrimination in the workplace. Lawyers may look to several sources of law in order to redress the rights of transgender clients who face adverse treatment in such situations, including transgender-specific nondiscrimination laws, state and federal sex discrimination laws, and state disability laws. Although courts historically have found transgender people excluded from coverage under certain laws, developing case law supports the arguments of transgender employees who face workplace discrimination.

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nas but not penises, reliance on surgery in this situation would have a starkly different impact on trans women than trans men. In view of these considerations, the judge in *Kantaras* declined to hold that phalloplasty is required for a transgender woman to be recognized as legally male, since any such requirement would be at odds with current medical knowledge and practice. In contrast, in the Chicago case, the trial court relied on the "lack" of genital reconstructive surgery to declare Sterling S. to be legally female, despite his male gender identity, extensive medical treatments, and twenty-plus years of living and being accepted as a man.

That the court's decision in *Kantaras* was shaped by expert medical testimony strongly suggests that providing such medical data is advisable to ensure that courts have the information they need to make informed decisions. The fact that the opinion was 800 pages long raises questions, however. If courts require extensive expert evidence and undertake detailed, individualized inquiries into a person's medical history, what recourse exists for clients who do not have access to experts or adequate medical care? Will certain surgeries or hormonal therapies become required? What if the client does not believe medical treatment is appropriate for him- or herself?

While courts desperately need the kinds of information provided to the judge in *Kantaras*, that court's complex, highly medicalized inquiry has the potential to create almost as many problems as it solves. The better approach is for courts to point to the medical standards of care, which conclude that sex is determined by gender identity: the court then needs only to look to the person's gender identity to determine his or her legal sex. Recognition of gender identity should provide the law with a consistent, relatively simple

approach that accords with medically accepted standards yet at the same time permits the flexibility that the standards of care contemplate.

Annulment of Marriage

Despite excellent lawyering, a court may follow the majority of courts and invalidate the client's marriage. What does this mean for custody? Under early American law, when a marriage was invalidated or annulled, courts did not divide property or determine custody as they would in a divorce. Instead, these courts attempted to return parties to their "original" positions. This meant that property (which, at the time, included children) was returned to the property holders, who were men. As a result of such injustices, modern doctrine provides that, for purposes of determining property division, support, and custody, annulment should be treated just like divorce. See, e.g., 63 A.L.R.2d 1008 (West 2002). Crucially, then, non-biological, transgender parents should not lose their legal rights to their children simply because their marriage has been annulled.

Advocates representing transgender spouses and parents should be prepared to assert this doctrine in the event that clients are denied legal recognition of their gender. In the worst case scenario, one in which a court rules that a transgender client is not a legal parent, the doctrine of functional parenthood may provide protection if the jurisdiction decides to follow the recent rulings by the highest courts in Massachusetts and New Jersey. Both courts held that, although the litigants had not adopted their partner's child, the nonbiological lesbian mother in each case was a full legal parent of the child. *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 1999). Pointing out that the doctrine applies to any person who meets the criteria, each court arrived at a similar, carefully crafted set of standards for determining functional parenthood—standards that most active parents should be able to meet.

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